85-1900

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES EDWARD EAKES,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETER W. LEWIS
216 Stratford No. 5
Houston, Texas 77006
713/224-6719

Counsel of Record

HENRY L. BURKHOLDER III
216 Stratford No. 5
Houston, Texas 77006
713/224-6719

Counsel for Petitioner

QUESTIONS PRESENTED

The Speedy Trial Act requires a criminal defendant to be tried within seventy days from initial appearance, but provides a mandatory thirty-day period in which a defendant cannot be tried without his consent. The Act requires dismissal of the criminal action if the trial proceeds after seventy days, less excludable periods of delay. Excludable periods of delay are provided for, inter alia, where the trial court finds that such delay is required by "the ends of justice."

The questions presented are:

(1) Whether the Court of Appeals was correct in finding that the continuance granted from December 8, 1984 (the trial date set for Petitioner's second superseding indictment and also the date

of arraignment for the third superseding indictment) to January 28, 1985, the date set for trial on the third superseding indictment was properly excludable delay under the "ends of justice" exception, since the trial court granted a continuance under the erroneous belief that the mandatory thirty-day period barred the government from proceeding to trial on December 8, 1984.

(2) Whether the Court of Appeals was correct in ruling that an "indirect" request for an continuance constitutes an adequate reason for the delay under the "ends of justice" standard, particularly where there is no indication that the trial judge balanced the factors specified by the statute.

Petitioner was convicted of transporting cocaine on three separate

occasions. The question presented is:

(3) Whether the Court of Appeals was correct in holding the evidence sufficient to convict appellant of possession of cocaine, where no person ever saw the cocaine appellant was to have have exercised control over.

LIST OF PARTIES

The parties to the proceedings below were the petitioner James Edward Eakes, and the United States of America.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES EDWARD EAKES,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner James Edward Eakes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on February

19, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 783 F.2d 499, and is reprinted in the appendix hereto.

JURISDICTION

Petitioner was indicted for conspiracy and possession of cocaine with intent to distribute. 18 U.S.C. § 841. On May 1, 1985, appellant received concurrent twelve year sentences on each count.

On February 19, 1986 the Court of Appeals affirmed petitioner's conviction. On March 17, 1986, petitioner's Motion For Rehearing was denied. A copy of the court's opinion, and order denying a rehearing, are attached to the appendix.

The jurisdiction of this Court to review the judgment of the Fifth Circuit

is involked under 28 U.S.C. § 12543(1) and Rule 20.1.

STATUTES INVOLVED

18 U.S.C. § 3161(c)(2)

18 U.S.C. § 3161(h)(8)(A)

STATEMENT OF THE CASE

Petitioner was originally charged in the Eastern District of Louisiana, with three separate indictments with conspiracy and the substantive offense of possession with intent to distribute cocaine, resulting out of three separate alleged cocaine shipments into the United States in July-October, 1982.

On November 15, 1984, the trial court determined that 23 days remained under the Speedy Trial Act (the Act). This calculation was not disputed in the court below. On November 29, 1984 a superseding indictment was filed. This indictment joined each of petitioner's three separate alleged drug shipments into the single indictment, and joined petitioner with Billy Joe Nichols.

Petitioner was scheduled to go to trial on the original indictments on December 6, 1984. On this date, petitioner was arraigned on the superseding indictment. The trial court found that the mandatory thirty day period under the Act barred the government from proceeding under the superseding indictments at that time. After consulting with counsel, the trial court rescheduled the trial until January 28, 1985.

On January 22, 1985 petitioner filed a motion to dismiss pursuant to the Act. The trial court denied the motion at a pretrial hearing on the date of trial.

The Court of Appeals found from the evidence at trial that petitioner and Robert Ross were hired to transport cocaine from Columbia into the United

States. Petitioner and Ross in turn hired Billy Joe Nichols, who flew shipments in July, 1982, and August, 1982. A third shipment was made on October 24, 1982.

No part of the "cocaine" petitioner allegedly shipped into the United States was ever analyzed by a chemist. Furthermore, there was sparse testimony concerning the physical characteristics of the substances being transported. Claude Griffin testified that he handled "opaque packages." Fred Compton commented that the substance in the duffle bags "could have been anything."

The Court of Appeals relied on United States v. Scott, 725 F.2d 43 (4th Cir. 1984) and United States v. Hill, 589 F.2d 1344 (8th Cir.), cert. denied, 442 U.S. 919 (1979). 783 F.2d at 504. In each of those cases the evidence was found

sufficient to support a finding beyond a reasonable doubt that the defendant had possessed the named contraband drug, without the drug every being seized and tested. In each case, testimony was given concerning the physical characteristics and narcotic effect of the possessed substance by eyewitnesses familiar with the narcotic in question.

The only testimony from any witness showing that any substance petitioner handled was cocaine came from William White. White told the jury that he had handled a shipment on October 24, 1982 involving packages which he had opened, and knew contained cocaine. However, White also told the jury that the petitioner was not associated with that shipment.

The Court of Appeals found the evidence sufficient to show that the substances being transported were in fact cocaine. 783 F.2d at 506. The Court emphasized the fact that (1) many of the co-conspirators referred to the substance as cocaine, (2) the substances were packaged like cocaine, (3) the transactions were carried out in secret, and (4) the co-conspirators received substantial sums of money for their transportation work,. Id. The Court concluded that, "[i]n light of this evidence, here, as in Hill case, [petitioner's] claim that no witness could verify the contents of the various loads as cocaine does not defeat the reasonable inference of the evidence presented that the substance imported in each load was cocaine." Id.

The jury found petitioner guilty of conspiracy and each of the three substantive counts of possession with intent to distribute cocaine. The trial court assessed concurrent twelve year sentences, and a special parole term.

On February 19, 1986 the Court of Appeals for the Fifth Circuit affirmed petitioner's conviction. On March 17, 1986, the Court overruled petitioner's motion for rehearing.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S FINDING THAT THE TRIAL COURT'S ERRONEOUS APPLICATION OF THE MANDATORY THIRTY-DAY RULE WAS NEVERTHELESS EXCLUDABLE DELAY IS IN CONFLICT WITH THE STATUTE, AND THE CASE LAW OF OTHER JURISDICTIONS, WHICH REQUIRES THE TRIAL JUDGE TO BALANCE CERTAIN FACTORS BEFORE GRANTING AN "ENDS OF JUSTICE" CONTINUANCE.

It is apparent from both the record and the Court of Appeal's opinion that the sole reason that the trial court continued the case on December 6, 1984,is because of the court's incorrect application of the mandatory 30 day rule. The decision is in direct conflict with the very terms of the statute, and creates a conflict with other jurisdictions correctly interpreting the statute.

At the time of petitioner's arraignment, there was a conflict in the

federal courts as to whether the mandatory thirty-day period applied to superseding indictments. See United States v. Rojas-Contreras, ___ U.S. ___, 106 S.Ct. 555, N1, 88 L.Ed.2d 537 (1985). The Court of Appeals in petitioner's case correctly found that, in light of this Court's decision in Rojas-Contreras, the trial court was in error in finding a new thirty-day mandatory period had to commence on the filing of the superseding indictment.

The Court of Appeals fell into error by finding that the trial court's erroneous construction of the statute could also constitute an adequate "ends of justice" continuance. 18 U.S.C. § 3161 provides, in part:

> "(h): The following periods of delay shall be excluded . . . in computing the time within which the trial of any such offense must

> commence: (8)(A) Any period of time delay resulting from a continuance granted by any judge on his own motion . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. . . (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows: . . ."

The factors are set out in the appendix. They include, inter alia, whether a miscarriage of justice might occur in the absence of a continuance, and the relative complexity of the case. There is no indication from the record, or the Court of Appeal's opinion, that the trial judge engaged in the necessary balancing of the proper determination. Such a determination was mandatory under the statute.

The record in petitioner's case is not clear that the trial court engaged in the proper statutory balancing of factors. Other circuits have held that where the record is not clear that the trial judge engaged in the proper balancing of factors, the period of delay resulting from the continuance is not properly excludable under the "ends of justice" provision. United States v. Tunnessen, 763 F.2d 74 (2nd Cir. 1985); United States v. New Buffalo Amusement Corp., 600 F.2d 368 (2nd Cir. 1979); United States v. Brooks, 697 F.2d 512 (3rd Cir. 1982), cert. denied, 460 U.S. 1071 (1982). The Court's opinion is even in conflict with an earlier Fifth Circuit case, United States v. Wentland, 582 F.2d 1022 (5th Cir. 1978), cert. denied, 439 U.S. 1133 (1979).

The Court of Appeals avoided the issue of whether an "ends of justice" determination should have been made by the trial judge, by finding that the trial court granted a continuance for the convenience of the trial counsel. 783 F.2d at 503. This continuance was granted by the court on its own motion, and not at the request of counsel. Furthermore, this continuance was granted only after the trial court had ruled that the 30 day mandatory period was triggered by the fact that the Government wanted to proceed on the superseding indictment.

The continuance ordered by the trial court on December 6, 1982 was clearly the result of the trial court's erroneous application of the mandatory thirty-day rule, and not the result of petitioner's request, indirect or otherwise. At the

time the continuance was granted, there were only 23 days at most left on petitioner's speedy trial time. petitioner's trial on January 28, 1985 was therefore well after the time limits provided for in the Act.

II.

THIS COURT NEEDS TO GIVE GUIDANCE TO THE TRIAL AND APPELLATE COURTS CONCERNING THE PROCEDURE FOR GRANTING AN "ENDS OF JUSTICE" CONTINUANCE UNDER THE ACT, IN LIGHT OF THE EMPHASIS IN ROJAS-CONTRERAS THAT THIS PROCEDURE IS ADEQUATE TO PROTECT A DEFENDANT FROM UNFAIR SURPRISE WITH A SUPERSEDING INDICTMENT.

In United States v. Rojas-Contreras, ___ U.S. ___, 106 S.Ct. 555, 88 L.Ed.2d 537 (1985) this Court established that a superseding indictment did not trigger a new mandatory 30 day period under 18 U.S.C. 3161(c)(2). This Court further found that any prejudice suffered by a defendant caused by a superseding indictment filed too close to trial could

be handled by the trial court granting an "ends of justice" continuance under 18 U.S.C. 3161 (h)(8)(A).

The decision by the Court of Appeals for the Fifth Circuit in petitioner's case leaves in doubt the question of how close the appellate scrutiny should be concerning the trial judge's decision to grant, or not to grant, a "ends of justice" continuance. Petitioner encourages this Court to grant this petition in order to define the limits, and give guidance to the lower courts, concerning how the trial judge should grant "ends of justice" continuances after a superseding indictment has been filed.

III.

THE COURT OF APPEALS RULING THAT PETITIONER'S DECISION NOT TO WAIVE THE THIRTY-DAY PERIOD WHICH THE TRIAL COURT HAD ASSUMED BARRED PETITIONER'S TRIAL AS CONSTITUTING AN INDIRECT REQUEST FOR A CONTINUANCE IS CLEARLY ERRONEOUS, SINCE A DEFENDANT IS NOT REQUIRED TO OBJECT TO DELAY OR OTHERWISE DEMAND A SPEEDY TRIAL UNDER THE ACT.

The Court of Appeals found that the petitioner's decision not to execute a waiver of the 30 day period was an indirect request for a continuance. 783 F.2d at 504. This assertion is incorrect both factually and legally.

The record is clear that petitioner never requested the continuance, nor did he or counsel at any timeindicate that they were not prepared for trial. The record is silent as to any assertion by petitioner or his counsel to the effect that they were not ready for trial at the time of the arraignment on the

superseding indictment.

The Court of Appeals assumed that by petitioner not making the affirmative act of waiving the 30 day period (which it is now established he had no right to have), the petitioner had to have been asking for a continuance. However, this Court noted in Rojas-Contreras, ___ U.S. ___, 106 S.Ct. 555, N1, 88 L.Ed.2d 537 that a conflict existed among the circuits concerning whether the 30 day mandatory period applied in petitioner's situtation. It cannot be inferred from petitioner's conduct that he was exercising the "indirect" method of requesting a continuance. At the most, it can only be inferred that petitioner did not want to waive any possible procedural error under the strict rules of the Act if Rojas-Contreras had been decided

differently by this Court.

The Court of Appeals further reasoned that

> "[Petitioner] did not object to the delay at that time. Now, in an effort to turn the benefit he accepted into an error that would undo his conviction, he complains that the grant and his acceptance of extra preparation time violated his rights." 783 F.2d at 503.

It is not clear from the trial court as to what benefit petitioner received. The record is silent as to any announcement by petitioner or his counsel to the effect that they were not ready for trial. Furthermore, there is no indication in the record that they had sought a continuance. The record, as it stands, shows that petitioner was ready for trial on December 6, 1984.

The Court of Appeals fell into error by its implicit assumption that petitioner was required to object to the

trial court's continuance ordered on December 6, 1984. The Act is not structured so that a defendant is required to object to not being brought to trial soon enough. Under the Act, the failure to object goes only to determine whether the statutory remedy of dismissal should be with or without prejudice. See United States v. Didier, 542 F.2d 1182 (2nd Cir. 1976).

IV.

THERE IS A CONFLICT IN THE FEDERAL COURTS CONCERNING THE TYPE OF CIRCUMSTANTIAL EVIDENCE NEEDED TO SHOW THE CHEMICAL NATURE OF A CONTROLLED SUBSTANCE IN LIEU OF A CHEMICAL ANALYSIS OF THE SAME.

This Court has established that as a matter of constitutional law, the government must prove each element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In reviewing the

sufficiency of the evidence, the inquiry is whether a rational trier of fact could find each element of the offense beyond a reasonable doubt. Jackson v. Virginia, 403 U.S. 337 (1979).

Petitioner was convicted of possession with intent to distribute cocaine. 18 U.S.C. § 851. It was necessary for the government to show beyond a reasonable doubt that the substance petitioner possessed was in fact cocaine. United States v. Quesada, 512 F.2d 1043 (5th Cir.), cert. denied, 423 U.S. 946 (1975).

The most direct method of proof that an individual possessed a controlled substance would be for the government to seize the substance and submit it to chemical analysis. See United States v. Haro-Espinosa, 619 F.2d 789 (9th Cir. 1979)(chemical tests sufficient to

determine identity of substance). It appears, however failure or inability to seize the substance allegedly possessed unlawfully is becoming more common. In petitioner's case, federal agents either purposefully failed to, or were unable to seize all or part of any of the three shipments of cocaine petitioner was convicted of transporting.

All the federal circuits agree that the character of the substance alleged possessed may be shown by circumstantial rather than direct evidence. However, the circuits disagree on what level of proof is required. Some circuits will support a conviction based solely on the circumstances surrounding the possession, without any witness having observed the actual physical characteristics of the substance. See United States v. Hill, 589

F.2d 1344 (8th Cir.), cert. denied, 442 U.S. 919 (1979); United States v. Murray, 753 F.2d. 612 (7th Cir. 1985). Other jurisdictions have found the evidence sufficient only where there was some eyewitness observation asto thephysical characteristics, and a showing that the witness was familiar with the controlled substance. United States v. Lawson, 507 F.2d 433 (7th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); United States v. Harrell, 737 F.2d 971 (11th Cir. 1984); United States v. Rodriquez-Arevalo, 734 F.2d 612 (11th Cir. 1984); United States v. Scott, 725 F.2d 43 (4th Cir. 1984).

The Court of Appeals sustained petitioner's conviction without a chemical analysis conducted on the alleged cocaine petitioner transported. The Court based its opinion in part on

the testimony of Bob Folse. The Court found from the evidence that Folse had agreed to accept one kilo of cocaine in exchange for allowing petitioner's aircraft to use his property. 783 F.2d at 506. The Court further found, however, that Folse had never used or sold cocaine before.

Petitioner was convicted of possession of cocaine without a chemical analysis of the alleged cocaine. The danger of a false conviction is particularly great, given that some forms of cocaine can be lawfully possessed. See United States v. Haro-Espinosa, 619 F.2d 789 (9th Cir. 1979); United States v. Luschen, 614 F.2d 1164 (8th Cir. 1979); United States v. Umentum, 547 F.2d 987, (7th Cir. 1976), cert. denied, 430 U.S. 983 (1977). Likewise, the danger that the substance

posssessed was in fact not a controlled substance lurks in every conviction based on circumstantial evidence.

This Court should grant this writ in order to resolve the conflict among the circuits concerning how much circumstantial evidence is required before a conviction on possession of a controlled substance can be had without a chemical analysis of the same.

CONCLUSION

For the various reasons noted above, this petition for certiorari should be granted. Under any of the three issues presented to this Court, this Court should reverse petitioner's conviction after a brief and a full hearing on the issues. In the alternative, petitioner prays this Court to issue a summary opinion finding the Court of Appeal's

ruling that the trial court's invocation of the mandatory thirty-day rule on December 8, 1984 was clearly erroneous, and remand to the Court of Appeals for the Fifth Circuit to reconsider petitioner's arguments concerning the statutory speedy trial error committed in his case.

Respectfully submitted,

PETER W. LEWIS
216 Stratford No. 5
Houston, Texas 77006
713/224-6719

Counsel of Record

HENRY L. BURKHOLDER III
216 Stratford No. 5
Houston, Texas 77006
713/224-6719

Counsel for Petitioner

APPENDIX
STATUTES INVOLVED

18 U.S.C. § 3161(c)(2): Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

18 U.S.C. § 3161(h): The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(8)(A) Any period of time delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the

Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from continuance granted in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any

case are as follows:

(i) Whether the failure to grant such a continuance would be likely to make a continuation of such a proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing

of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

IN THE UNITED STATED COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 85-3259

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JAMES EDWARD EAKES,
Defendant-Appellant.

Appeal from the United States
District Court for the
Eastern District of Louisiana

Chief Judge, TATE, and DAVIS,
Circuit Judges.

CLARK, Chief Judge:

Appellant James Eakes challenges his convictions for conspiracy to import cocaine, conspiracy to possess with

intent to distribute cocaine, and the corresponding substantive crimes. We affirm on all issues except Eakes' contention that the judgment erroneously recites convictions for two charges that were not in the indictment. We remand on this issue with directions for the entry of a new judgment that corresponds with the indictment and convictions.

I

Claude Griffin and Ferando Lopez hired James Eakes and Robert Ross to transport cocaine from Columbia into the United States. Eakes and Ross hired Billy Joe Nichols to pilot the aircraft transporting the cocaine. Nichols piloted the plane that brought shipments of cocaine into the United States in July, 1982, and in August, 1982.

Griffin, Eakes, and Ross had a falling

out over money after the second shipment. Griffin made independent arrangements with Nichols for the transportation of a third shipment in September, 1982. Nichols was not able to transport this shipment because his aircraft developed mechanical problems. Griffin then made arrangements with Eakes and Ross for transportation of the third load.

Eakes and Ross contrived and executed a complex plan to deceive the other co-conspirators, and to steal and distribute the third load of cocaine themselves. Griffin and Lopez made plans for a fourth shipment, which they never attempted.

Nichols was convicted of conspiracy to import cocaine and to possess with intent to distribute cocaine on the basis of the unattempted plan to smuggle a fourth load of cocaine into the United States.

Nichols was then charged with both conspiracy and the corresponding substantive crimes in three separate indictments. The three cocaine shipments that actually reached the United States formed the basis for the three separate indictments. Likewise, Eakes was charged with conspiracy and with the corresponding substantive crimes in three separate indictments based on the three shipments that entered the United States.

On appeal of the denial of Nichols' motion to dismiss his indictments as violative of the double jeopardy clause, a panel of this court held that Nichols had "participated in a single conspiracy to commit multiple violations of the drug control law." United States v. Nichols, 741 F.2d 767, 772 (5th Cir. 1984), cert. denied, 105 S.Ct. 1186 (1985). The

district court then granted Nichols' motion to consolidate the three indictments.

The resulting superseding indictment was filed on November 29, 1984. It named Nichols and Eakes as co-defendants. It charged Eakes with one count of conspiracy to import cocaine, one count of conspiracy to possess with intent to distribute cocaine, three counts of importation of cocaine, and three counts of possession with intent to distribute cocaine. The indictment charged Nichols with the six counts that corresponded to the substantive crimes.

Eakes and Nichols were arraigned on the superseding indictment on December 6, 1984, the same day for which their trial was originally set. The presiding judge interpreted the Speedy Trial Act (the

Act) to require a thirty-day continuance from the date the defendants' arraignment on the superseding indictment. Both Eakes and Nichols expressly refused to waive this right. After conferring with all attorneys on their upcoming schedules, the judge reset the trial for January 28, 1985. On January 22, 1985, Eakes filed a motion to dismiss the superseding indictment for failure to grant a speedy trial. The district court denied that motion at the pretrial hearing on the date of trial.

At trial, Eakes testified in his own defense. He claimed that he acted in the smuggling operation as a government informant. A jury convicted him on all eight counts of the indictment. He received a tweleve-year sentence on each count. The sentences were to run

concurrently.

On appeal, Eakes makes six arguments: (1) the trial court's continuance of the trial until January 28, 1985, violated his statutory right to a speedy trial; (2) the government failed to prove beyond a reasonable doubt that the substance Eakes and Nichols imported was cocaine; (3) the trial court's refusal to admit into evidence a taped telephone conversation between Ross and Drug Enforcement Administration (DEA) agent Howard Whitworth constituted reversible error; (4) the trial court's refusal to admit a tape of a conversation between Eakes and DEA agent Michael Hurley constituted reversible error; (5) the trial court's admission of photographs of cocaine and of an automobile seized by the police was reversible error; and (6)

the judgment erroneously recites convictions for aiding and abetting, and for conspiracy to distribute cocaine.

II

Eakes asserts that the delay of his trial until January 28, 1985, violated his rights under the Speedy Trial Act. That Act provides that a defendant's trial must begin "within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judical officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. §3161(c)(1). "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives

counsel and elects to proceed pro se." 18 U.S.C. § 3161(c)(2). The Act also defines certain "periods of delay" which are not included "in computing the time within which the trial of any such offense must commence." See 18 U.S.C. § 3161(h).

Relying on the language of the Act and its legislative history, the United States Supreme Curt recently held that the Act does not mandate the commencement of a new thirty-day trial preparation period upon a defendant's arraignment on a superseding indictment. United States v. Rojas-Contreras, 54 U.S.L.W. 4061, 4061 (U.S. Dec. 17, 1985), reversing 730 F.2d 771 (9th Cir. 1984). Due to a typographical error, the original indictment against that defendant mistated the date of a previous conviction on which the enhancement of

the charged offense was based. The superseding indictment corrected that reference. The defendant claimed entitlement to a thirty-day continuance of his trial under § 3161(c)(2) of the Speedy Trial Act. Id. at 4061-62.

In rejecting this claim, the Supreme Court stated that "a defendant must [not] always be compelled to go to trial less than 30 days after the filing of such an indictment." Id. at 4062. The district judge still has a broad discretion to grant a continuance if "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." Id (quoting 18 U.S.C. § 3161(h)(8)). The "ends of justice" provision authorizes a continuance in cases where a superseding indictment prejudices a defendant. Id. at

4062-63.

Eakes claims that the trial court erroneously continued his trial for thirty days on its own motion.[1] That additional thirty days was not a properly excludable period under the Act. As a result, he says, the seventy days during which the Act mandated the trial must commence expired before the trial took place.

Eakes also makes the following two alternative arguments. First: On November 15, 1984, the trial court correctly determined that the twenty-three days remained in his initial thirty-day

[1] If the trial court grants a defendant's motion to dismiss an indictment, and the government then reindicts the defendant on the same basic charges, the thirty-day preparation begins anew with regard to the new indictment. 18 U.S.C. § 3161(d)(1).

prepartion period. Between that date and

Eakes' arraignment on the superseding indictment on December 6, 1984, six nonexcludable days elapsed. Even if the Act required a new excludable thirty-day waiting period upon his arraignment on the superseding indictment, that new period should have run concurrently with the days remained in that first preparation period. The second period, and the time during which Eakes' trial had to commence, expired on January 5, 1985.

Second: Even if the additional thirty-day continuance was proper, excludable, and not required to run concurrently with the original preparation period, the trial court miscalculated the number of days remaining in the first period. The court allowed for twenty-three additional days when only seventeen remained. The

time for commencement of Eakes' trial thus expired on January 22, 1985.

None of Eakes' arguments are tenable under the facts and circumstances presented here. At the arraignment on the superseding indictment, the presiding judge noted that the superseding indictment represented a "housekeeping maneuver" which did not contain any new substantive charges against Nichols and Eakes. He stated that he interpreted the Act to entitle the defendants to a thirty-day waiting period between the time of their first appearance on the superseding indictment and the commencement of trial, absent their waiver of this right. He then asked Eakes' attorney if Eakes was prepared to waive this right and proceed with th trial that morning as scheduled. Eakes's

attorney answered negatively. Nichols' attorney also responded negatively to the same question. In light of these reponses, the judge stated that since both defendants wished to exercise their rights under the Act, continuing the trial would serve the ends of justice. Following a discussion between the judge and attorneys concerning their respective schedules, the judge reset the trial for January 28, 1985. Eakes' attorney expressly agreed to that date.

In Rojas-Contreras, and in all but one of the cases cited by Eakes in support of his main argument, it was the defendant who requested the thiry-day continuance after the return of a superseding indictment. The alleged error the district court was the court's refusal togrant that request. See United States

v. Adu, 770 F.2d 1511, 1513-14 (9th Cir. 1985)(new thirty-day period not required where new indictment merely corrected a clerical error and did not change alleged facts or charges); United States v. Hawkins, 765 F.2d 1482, 1487 (11th Cir. 1985)(trial court has discretion to balance interests of government and defendant and grant or deny a continuance for trial preparation on a superseding indictment); United States v. Rush, 738 F.2d 497, 510-11(1st Cir.)(new thirty-day period not required where superseding indictment named additional defendant even though original indictment was still outstanding), cert. denied, 105 S.Ct. 1355 (1985); United States v. Horton, 676 F.2d 1165, 1170 (7th Cir. 1982)(new thirty-day period not required where new indictment charged same offense but

reduced the number of counts), cert. denied, 459 U.S. 1201 (1983); United States v. Todisco, 667 F.2d 255, 260 (2nd Cir. 1981)(new thirty-day period not required when charges in the superseding indictment were substantially the same as those in the original indictment, and where substantial discovery had taken place); see also United States v. Harris, 724 F.2d 1452, 1454-55 (9th Cir. 1984)(new thirty-day period required by because "section 3161(c)(2) . . . guarantee[s] that the defendant is not forced to trial less than thirty days from the date on which the defendant first appears on the indictment on which the defendant ultimately goes to trial")(emphasis in original).

In United States v. Dennis, the Eighth Circuit held that the trial court's grant

of the government's motion for a continuance after the trial court dismissed a principle count of the indictment was not an abuse of discretion under the ends of justice provision or a violation of the appellant's constitutional right to a speedy trial. 625 F.2d 782, 793-94 (8th Cir. 1980).

Here, although the judge misinterpreted the Act, he granted the thirty-day delay because Eakes expressly refused to waive assumed right to it. Eakes did not object to the delay at that time. Now, in an effort to turn the benefit he accepted into an error that would undo his conviction, he complains that the grant and his acceptance of extra preparation time violated his rights. The Speedy Trial Act entitles criminal defendants to adequate time for

preparing a defense, but that right may not be used as a two-edged sword in this fashion. Cf. Rush, 738 F.2d at 508 (defendants may not "deliberately obtain an (h)(8) continuance for their own convenience in the face of speedy trial concerns articulated by the trial court and then later claim that the court abused its discretion in granting the requestedcontinuance")(citations omitted).

Rojas-Contreras and the facts of this case also refute Eakes' alternative arguments. A district judge has the discretion to continue a trial under the ends of justice provision even though the Act does not require an additional thirty-days after arraignment on a superseding indictment. Rojas-Contreras, 54 U.S.L.W. 4062-63. A judge's finding

that a continuance would best serve the ends of justice is a factual determination subject to review under the clearly erroneous standard. See United States v. Nance, 666 F.2d 353, 356 (9th Cir.)("we do not disturb factual findings underlying the district court's determination unless they are clearly erroneous"), cert denied, 456 U.S. 918 (1982).

The judge here continued the trial because both Eakes and Nichols expressly refused to waive any rights they had under the Act, and because their arraignment on the superseding indictment took place on the same day for which the trial was scheduled. The defendants' refusal to waive their assumed right to additional time indicated to the judge that the defense was not ready for trial.

In granting the continuance, the judge stated that by doing so, "the ends of justice will be best served." The judge then discussed a date for the trial with all four defense attorneys. The judge and the attorneys agreed on January 28, 1985, as the preferable date for everyone. Eakes' attorney expressed satisfaction with that date.

In light of these facts, the judge's decision to continue the trial was not clearly erroneous, and any error he made in calculating the appropriate number of additional days did not prejudice Eakes. The record discloses that he continued the trial until January 28th for the convenience of counsel on both sides, not as Eakes contends, in order to include an erroneously calculated additional twenty-three days. In fact, the trial judge

first suggested a trial date of January 7, 1985. The trial court's conclusion that a continuance would best serve the ends of justice under these circumstances was not clearly erroneous, nor was his election of a trial date violative of Eakes' statutory right to a speedy trial.

Eakes also implies, however, that his conviction cannot stand because the district judge did not comply with the Act's requirements for the grant of an ends of justice continuance. The Act provides that the court must "set[] forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(B), (C). Eakes

suggests that the district judge failed to sufficiently state his reasons for granting an ends of justice continuance.

Contrary to Eakes' suggestion, the basis for the judge's grant of an ends of justice continuance is apparent from the record. The judge granted the continuance "given the fact that both defendants . .

under 3161(c)(2) and the fact that both men were only arraigned today on the counts contained in th superseding indictment." The clear meaning of the exchange between the judge and the defense attorneys was that the judge was ready for trial that day and wanted to know whether the defense was also ready or whether it needed more time. The negative reply of Eakes' attorney when the judge asked for a waiver of rights

under the Act indicated that the defense was not ready for trial and did need more time.

We decline to apply a hypertechnical construction to the language of the Act in this case where the judge clearly granted the continuance for the benefit of and at the indirect request of the defendant who now complains of that grant. Cf. United States v. Richmond, 735 F.2d 208-211-12 (6th Cir. 1984)(two-week postponement of trial after jury selection because defense counsel was not ready did not constitute attempt by trial judge to evade Speedy Trial Act requirements); United States v. Nance, 666 F.2d at 357-58 (portion of continuance necessitated by defense counsel's scheduling conflicts was excludable under ends of justice

provision). The judge used the ends of justice provision in a reasonable manner under the circumstances. While the better practice would have been to articulate specific reasons, the record adequately defines the basis on which the court acted. Eakes has wholly failed to demonstrate the continuance until January 28, 1985, constituted reversible error.

III

Eakes also urges reversal on the ground that the government failed to prove beyond a reasonable doubt that the substance he imported was cocaine. In response to a charge that the evidence is insufficient to support the judgment, we consider the evidence in the light most favorable to the government. "We will reverse only if a reasonably minded jury must necessarily have entertained a

reasonable doubt of a defendant's guilt." United States v. Galan, 693 F.2d 417, 419 (5th Cir. 1982)(quoting United States v. Vergara, 687 F.2d 57, 60 (5th Cir. 1982)).

Eakes concedes that circumstantial evidence may establish the identity of a drug in a prosecution for violation of the narcotics laws, as long as it does so beyond a reasonable doubt. See United States v. Quesada, 512 F.2d 1043, 1045 (5th Cir.), cert.denied, 423 U.S. 946 (1975)(citations omitted). He claims, however, that the circumstantial evidence the government offered to prove the substance involved in this case was cocaine was insufficient. He relies on several cases in which courts held that particular circumstantial evidence not offered here was sufficient for an

affirmance of both conspiracy and substantive drug convictions. See United States v. Harrell, 737 971, 978-79 (11th Cir. 1984)("Identification based on past use coupled with present observation of the substance at hand will suffice to establish the illicit nature of a suspected substance."), cert. denied, 105 S.Ct. 1392 (1985); United States v. Haro-Espinosa, 619 F.2d 789, 795 (9th Cir. 1979)(six tests conducted by an expert were sufficient to establish substance was cocaine); United States v. Crisp, 563 F.2d 1242, 1244 (5th Cir. 1977)(testimony establishing defendants referred to substance as coke or cocaine, snorted it, cut it, weighed it, tested it over a flame and under a microscope, and sold it for large amounts of money was sufficient to prove identity of substance).

Other cases suggest, however, that various types of circumstantial evidence are sufficient to establish the identity of a controlled substance in a criminal prosecution. United States v. Scott, 725 F.2d 43 (4th Cir. 1984), involved proof that a substance was cocaine very similar to the proof offered in the case at bar. The prosecution in Scott produced no samples of the substance in question, no chemical analysis, and no expert testimony. The government relied on the "lay testimony" of a cocaine user who stated that he bought some powder from the "same batch" as that purchased by the defendant, that he tested the substance by "snorting" it, and that he concluded it was cocaine. Id. at 44. The court defined the permissible types of circumstantial proof:

> [E]vidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions invovling the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence.

Id. at 45-46 (quoting United States v. Dolan, 544 F.2d 1219, 1221 (4th Cir. 1976)). The Court concluded that all these types of circumstantial proof were present in the case and confirmed the appellant's convictions for possession of cocaine. Id.

In United States v. Hill, 589 F.2d 1344 (8th Cir.), cert.denied, 442 U.S. 919 (1979), the defendant was charged with fraudulently obtaining by means of false orders, and illegally distrubting,

diet pills manufactured by his employer. As in Scott and the case at bar, the government did not seize the drugs or have direct evidence that Hill ever possessed them. The government's evidence showed only "that the shipments were never returned to [the manufacturer] for credit, that Hill had volunteered to pick up the shipments and take care of the matter, [and] that Hill did go to the customers' officers and take pills (although there were not always eyewitnesses)." Id. at 1349. The court held this evidence was sufficient to show possession. Id. The court further noted that "Hill's claim that none of the government witnesses could identify the contents of any of the specific shipments as Statobex-D [diet pills] does not defeat the reasonable inference of the

evidence presented that the boxes did contain Statobex-D." Id. at 1350 (citation omitted).

United States v. Lawson, 507 F.2d 433 (7th Cir. 1974), cert. denied, 420 U.S. 1004 (1975), involved a cocaine transaction. The court held that the following evidence indentified the substance in question as cocaine sufficiently to support convictions for conspiracy and substantive crimes: the defendant's girlfriend and the purchaser testified the substance was a white powder; they also testified the defendant spoke of selling "cocaine;" the purchaser paid the defendant a substantial amount of cash for the white powder; and the transaction was carried out in secret. Id. at 439.

Similar circumstantial proof was

present in the case at bar. Claude Griffin testified that he conspired with others to import cocaine into the United States. He testified that Eakes participated in the transportation of the substance. Griffin testified that he received large amounts of money in payment for most this work, and that he received cocaine in payment for the second load.

Paul Gray testified that the Griffin-Lopez conspiracy imported three loads of cocaine, and that Eakes participated in some way with each load. Gray unloaded and delivered the first two loads for Griffin, and received and delivered large amounts of cash in return. He stated the first load was packaged in a fashion usual for cocaine, individual packages or kilos and duffle bags. The second load

was packaged in plastic bags and suitcases. Gray did not see what the cocaine looked like at the unloading, but he did later.

Bob Folse testified that Eakes contacted him about using an airstrip on his land. The conspirators paid him $5000 for the use of the airstrip for the first load of cocaine. Folse thought they were importing marijuana. When he found out the smuggled substance was cocaine, he renegotiated the fee and Griffin agreed to pay him $60,000 for the use of his property on the second cocaine load. Later, Folse agreed to take one kilo of cocaine in payment rather than the money. Folse had seen cocaine before, but had never used or sold it. His cousin sold the kilo for either $68,000 or $72,000.

Robert LeBlanc testified that the plane carrying the third stolen load of cocaine landed on his property and that Ross offered him a million dollars to secure and distribute the load. He helped unload that cocaine, which was packaged in duffle bags. LeBlanc kept six out of the duffle bags, out of which he sold between fifteen and thirty kilos of cocaine. He testified that the people involved with this third load eventually gained over two millions dollars from the transaction. LeBlanc had been involved in various capacities with marijuana and cocaine smuggling before this incident.

William White also testified that he helped unload the stolen third load of cocaine. Three or four duffle bags from the plane were loaded in his car and he took them to his home. The next day he

noticed one of the duffle bags was unlocked. He took a package out of the duffle bag and opened it. He testified the package contained cocaine. White and his partner kept two kilos in return for their storage of a portion of the load. They sold part of the kilos they kept. Although White stated that he did not see Eakes in connection with this load of cocaine, other witnesses testified that Eakes participated in the plan to steal this load from Griffin and Lopez.

Eakes testified as well concerning his knowledge of and participation in this plan. Throughout his testimony, Eakes and his attorney referred to the substance transported by the Griffin-Lopez conspiracy as cocaine. Eakes also testified that the conspirators received large cash payments for their

transportation work and for the cocaine they distributed.

The whole of the above circumstantial evidence is sufficient to support an inference that the substance imported by the smuggling conspiracy in which Eakes participated was cocaine. Eakes and all the co-conspirators referred to the substance as cocaine. The substance was packaged in kilos as cocaine normally is packaged. The transactions concerning these packages were carried out in secret. The co-conspirators received substantial sums of money or cocaine for their transportation work. The sellers received large cash payments for the substance. Co-conspirators familiar with cocaine testified the packages substance was cocaine. The fact that various conspirators successfully imported and

sold the substance three times indicates that they dealt with cocaine and not a counterfeit product. In light of this evidence here, here, as in Hill, Eakes' claim that no witness could verify the contents of the various loads as cocaine "does not defeat the reasonable inference of the evidence presented that the" substance imported in each each load was cocaine. 589 F.2d at 1350.

IV

Eakes objects to three of the district court's evidentiary rulings. The trial judge refused to admit into evidence a taped conversation between co-conspirators Ross and DEA agent Whitworth, and a taped conversation between Eakes and DEA Hurley. The judge admitted photographs of cocaine seized by the police and of the car in which the

police found the cocaine.

Rulings on the admissibility of evidence are within the discretion of the trial court. We review those rulings only for an abuse of discretion. United States v. Acosta, 763 F.2d 671, 693 (5th Cir.), cert. denied subnom. Weempe v. United States, 106 S.Ct. 179 (1985)(citation omitted); United States v. Cochran, 697 F.2d 697 F.2d 600, 608 (5th Cir. 1983)(citation omitted).

The judge excluded the tape between Ross and Whitworth primarily because Ross was a fugitive and not available for cross-examination during the trial. The judge admitted a transcript of the tape between Eakes and Hurley. The record leaves in doubt whether either tape was audible.Eakes has not shown that the trial judge abused his discretion in

refusing to admit these tapes.

Government witness Paul Gray testified that he unloaded a large amount of cocaine in August, 1982, from a plane piloted by Nichols. Although Gray testified that Eakes did not go to the landing strip for the unloading of this second load of cocaine, he stated that he met with Eakes and Griffin in a motel room before going to meet the plane. He said Eakes gave him some instructions regarding the seats in the airplane. Gray delivered a car containing a portion of that load, designated by prearranged markings, to a man known as Oscar. Gray testified Oscar was driving the car depicted in the photographs when Gray met with him to decide on a delivery site for the cocaine. He also testified that the packaging and markings of the cocaine

that he delivered to Oscar were similar to that of the cocaine seized by the police and depicted in the photographs.

Captain Robert Early of the Jefferson Parish Police testified that he conducted a surveillance of a man named Oscar Tabarres over the weekend during which Tobarres was arrested. He observed Oscar drive to a warehouse. The packaged substance depicted in the photographs was seized from a car in this warehouse. The bags had differentiating marks on them. This substance field tested positive for cocaine. The seizure occurred within a week of the flight piloted by Nichols and the delivery to Oscar by Gray.

Evidence may be so remote as to be irrelevant. Here, however, the government demonstrated a connection in time between the evidence in question and the crimes

charged to Eakes, and a connection between a co-defendant hired by Eakes and the parties from whom the police seized the evidence. The trial judge did not abuse his discretion in admitting the photographs of the cocaine and car seized from Oscar.

V

Finally, Eakes claims that the judgment erroneously cites two offenses for which he was neither indicted nor convicted, Aiding and abetting and conspiracy to distribute. We remand on this issue with directions for the entry of a new judgment that is consisted with the indictment and jury verdict.

AFFIRMED in part, and, in part, REMANDED WITH DIRECTIONS.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-3259

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES EDWARD EAKES,
Defendant-Appellant

Appealed from the
United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(March 17, 1986)

Before CLARK, Chief Judge,
TATE and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE